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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-115

NORMAN H. EGENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 441 F. 2d 441.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1971. A petition for rehearing was denied on May 24, 1971. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to July 23, 1971, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court, in charging the jury, wrongly instructed it as to the standard of willfulness under 18 U.S.C. 1001, improperly omitted to instruct that it might consider a defense of economic coercion with respect to the gratuity counts, and wrongly withdrew the aiding and abetting charge as to count 62.

2. Whether petitioner was properly charged with a felony (18 U.S.C. 1001) rather than a misdemeanor (26 U.S.C. 7207) for making false statements on certain tax returns.

3. Whether the order to submit handwriting exemplars to the grand jury violated petitioner's Fourth Amendment rights.

STATEMENT

After a jury trial on an eighty-eight count indictment in the United States District Court for the Southern District of New York, petitioner was convicted on twenty-two counts charging unlawful payment of gratuities (18 U.S.C. 201(f)); on count 62, charging petitioner with making false statements on the departing alien income tax return (Form 1040C) of taxpayer Sixten Ehrling filed on April 17, 1965 (18 U.S.C. 1001); and on counts 77 and 81, charging petitioner with listing false deductions on the Form 1040C tax returns of taxpayers Sixten Ehrling and Jonathan Vickers for the year 1965 (26 U.S.C. 7206(2)). Petitioner was sentenced to two years' imprisonment and a $100 fine on each of the twenty-two gratuity counts; five years' imprisonment and a fine of $10,000 on count 62; and three years' imprisonment and a fine of $2,000

on counts 77 and 81. The prison sentences were made to run concurrently. The court of appeals affirmed (Pet. App. 1a-8a).

As explained in detail by the court of appeals (Pet. App. 1a-5a), petitioner, a tax accountant specializing in practice before the Alien Tax Section of the Internal Revenue Service, represented various European artists appearing in this country. As non-resident aliens, these artists were required to file an income tax return (Form 1040C) whenever they left the United States on which they were to report all income earned in the United States from the beginning of the calendar year until the date of their departure. Federal taxes were withheld on their United States income at the rate of thirty per cent. If at the time of departure an alien did not intend to return to this country before the end of the year, he was entitled to an immediate refund for any overpayment of taxes. Pursuant to powers of attorney, petitioner filed a Form 1040C on behalf of each of his clients and at the end of each tax year he prepared and filed their year-end returns, frequently without consulting them (Tr. 522-525, 527-532).

In most cases, when petitioner would file the tax form for the departing aliens, he would include a form list of deductions, including commissions, coaching, publicity, voice training and other typical expense items. Although in the early 1960's petitioner seldom substantiated the claimed deductions—which were often grossly inflated —the returns were generally accepted with only minor changes. In return for this favorable treatment, petitioner periodically paid substantial

sums of money to Vincent Fontana, Solomon Gordon and Raphael Pacello, the three Internal Revenue Service Alien Tax Section technicians responsible for examining the bulk of the returns which he submitted (Tr. 520-532, 921, 1156-1159). Early in 1964, the review system was changed and the tax technicians were required to submit approximately ten per cent of their returns for immediate review by supervisory personnel. Petitioner adapted to this change by submitting substantiating documents with the returns, many of which were either altered or forged (Tr. 532, 881-883, 1165-1170).

In late 1964, Vincent Fontana confessed to the Internal Revenue Service that he had participated in widespread corruption in the Alien Tax Section. By an arrangement with the Internal Revenue Service Inspection Service, Fontana retained his position in order to report in a daily log any evidence of graft in the section and to turn over to the Inspection Service any unlawful payments which he might receive. Fontana kept his log from January 1965 until January 19, 1966, when petitioner and tax technicians Solomon Gordon and Raphael Pacello were arrested (Tr. 1165-1170). According to the log, petitioner made ten cash payments totalling $440 and gave several gifts to Fontana. During the same period, Fontana examined at least thirty tax returns prepared and filed by petitioner on behalf of non-resident aliens. Fontana testified that, with respect to all the returns which contained deduction schedules, he granted petitioner favorable

treatment by accepting deductions which he knew were excessive and frequently unsubstantiated (Tr. 1171-1238, 1296).

During 1965, petitioner also made six or seven payments to tax technician Solomon Gordon,[1] totalling $500 to $600. Gordon testified that petitioner had given him this approximate sum annually since 1960 or 1961 in exchange for favorable treatment. Gordon believed that petitioner would have continued to pay him the same amounts at fairly regular intervals had the payments not been uncovered by the Inspection Service (Tr. 885-906, 913-923, 997).

Among the returns prepared by petitioner was the 1040C return of Metropolitan Opera tenor Jonathan Vickers, filed by petitioner on June 15, 1965. The return reported gross income from February 20 to June 15, 1965, of $32,525, all from the Metropolitan Opera Company, and listed total expenses of $13,638.75, including commissions of $9,757.50 (thirty per cent of gross income) and a publicity item of $2,876.60. Vickers testified that he had never seen the return before it was filed, nor had he signed it. He stated that his agent's commissions were ten per cent of his gross income, a figure which was corroborated by testimony of his American agent, William Stein. Vickers further stated that his only publicity expenses were incurred on his

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[1] Prior to testifying in the Egenberg trial, Gordon pleaded guilty to a seven-count information charging him with receiving unlawful gratuities in violation of 18 U.S.C. 201(g) and 2. He was sentenced to a term of imprisonment of nine months and fined $10,000.

behalf by Stein, who testified that during the period in question there had been no such expenses. Furthermore, neither Vickers nor Stein ever told petitioner that Vickers had any publicity expenses or that his commissions were thirty per cent of gross income (Tr. 243-244, 247-248, 253-262, 290-294, 907-909).

While petitioner was making periodic cash payments to Fontana and Gordon for their favorable treatment of alien returns, he allowed tax technician Raphael Pacello [2] the use of various credit cards to charge substantial expenses. During 1965, Pacello examined the 1040C form of Sixten Ehrling, the musical director of the Detroit Symphony Orchestra. Pacello stated that in consideration for the use of petitioner's credit cards he treated the returns filed by petition favorably and usually followed petitioner's instructions, even in disallowing claims. Over half of the returns filed by petitioner and examined by Pacello in 1964 and 1965 showed net losses for the taxpayers (Tr. 1049-1079, 1131).

Sixten Ehrling's 1040C return, filed by petitioner and examined by Pacello, indicated that Ehrling's gross income from January 1 to April 15, 1965, was $14,492.08, with expenses totalling $13,081.22, which resulted in a refund of $1,376.66. Ehrling testified that his agent's commissions actually totalled only twenty

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[2] Prior to testifying at trial, Pacello pleaded guilty to an eight-count information charging him with receiving unlawful gratuities from petitioner in violation of 18 U.S.C. 201(g) and 2. He was sentenced to a term of imprisonment of four months and a fine of $7000.

per cent of his gross income as opposed to the thirty per cent figure reported by petitioner. He further stated that whatever publicity expenses he had incurred for the period were reflected in Columbia Artists' statements—which showed payments of only $10.61, compared to the $1,575 reported by petitioner. Ehrling added that he had incurred no expenses for a secretary-interpreter or accompanist, although his Form 1040C—which he never saw before filing—claimed deductions of $575 and $340 for those expenses (Tr. 602-613, 640-641, 1377-1382). Finally, petitioner indicated on the return that Ehrling did not intend, as of April 15, to return to the United States before the end of the year. In fact, Ehrling was contractually obligated to conduct the Detroit Symphony Orchestra at special appearances during the summer and its regular season in the fall (Tr. 598-602, 613-615). The government introduced handwriting evidence to show that petitioner had reviewed Ehrling's file at Columbia Artists which contained all of Ehrling's contracts (Tr. 1613-1624).

Petitioner admitted making cash payments to Fontana and Gordon and allowing Pacello to use his credit cards, but claimed that the sole purpose of the transactions was to prevent the internal revenue technicians from delaying and interfering with the processing of the tax returns of his clients (Tr. 1426-1431, 1683-1693). Petitioner testified that he nearly always asked artists personally at the time of their departure whether they intended to return to the United States

and prepared their tax forms on the basis of their replies. As for Sixten Ehrling, petitioner claimed that a secretary at Columbia Artists had told him that Ehrling had no plans to return (Tr. 1452-1456, 1962).

ARGUMENT

1. Petitioner contends (Pet. 11-13) that the trial judge erred in instructing the jury with respect to the false statement counts under 18 U.S.C. 1001 that petitioner could be found to have acted with the requisite knowledge and willfulness if the jury concluded beyond a reasonable doubt that he had acted "with reckless disregard of whether the statement * * * was true" or "with a conscious purpose to avoid learning the truth" (Tr. 1957). The decision below, upholding the charge (Pet. App. 7a), however, is consistent with earlier decisions of the Second Circuit (see *United States* v. *Abrams,* 427 F. 2d 86, 91 (C.A. 2), certiorari denied, 400 U.S. 832, and cases cited therein) and, in our view, is correct. It is reasonable to infer that Congress, in enacting 18 U.S.C. 1001, did not intend to differentiate between a person who makes a statement after having ascertained that the statement was false and a person who makes a statement with reckless disregard of the facts or a conscious purpose to avoid learning the truth. In neither case are the statements made in good faith.

Petitioner attempts to establish a conflict on the above point between the decision below and decisions of this Court and other courts of appeals. The cases

relied upon (Pet. 12), however, contain no discussion of whether willfulness includes the concept of acting with reckless disregard of the facts. Petitioner's reliance on *Jacobs* v. *United States*, 359 F. 2d 960 (C.A. 8), for example, for the proposition that carelessness or lack of wisdom is not equivalent to the knowledge of falsity required by a statute similar to 18 U.S.C. 1001 (see 359 F. 2d at 966) is of little avail to him here since the *Jacobs* court earlier in its opinion held merely that the requirement of knowledge was not met if the defendant there "reasonably believed"—which the court found he did—that the statements made by him were valid. 359 F. 2d at 965. The instructions of the trial court here were fully consistent with that holding.

Petitioner contends (Pet. 15-18) that the trial court erred in refusing to charge the jury that the establishment of solicitation by the internal revenue agents and economic pressure on petitioner to make the requested payments would constitute a defense to the gratuity counts under 18 U.S.C. 201(f). This issue was not raised in the court of appeals and should not be considered here. The trial court's charge that to convict on the gratuity counts—in contrast to the bribery counts—"there need not be proof * * * that there was any intent by the defendant to influence an official act of the public official" (Tr. 1945) was correct and recognized the essential distinction between a gratuity charge and a bribery charge. Whether or not the kind of "economic coercion" to which petitioner claims to have been subject is properly relevant to a defense

against a charge of bribery, it is not relevant to a charge of giving gratuities to a public official which does not require a specific intent. See *United States* v. *Barash,* 412 F.2d 26, 29-30 (C.A. 2), certiorari denied, 396 U.S. 832.

Petitioner also contends (Pet. 13-14) that prejudicial error occurred when the trial court withdrew from the jury the aiding and abetting charges against petitioner in connection with the counts alleging violation of 18 U.S.C. 1001, including count 62 on which he was convicted. As to each of the false statement counts, the indictment charged petitioner both as a principal and under 18 U.S.C. 2 as an aider and abetter. The trial judge initially read the aiding and abetting statute to the jury but then commented, as all parties had previously agreed (Tr. 1911-1912), that the section was inapplicable to the facts of the case (Tr. 1955-1956). Petitioner subsequently excepted to the charge as given, and the trial judge agreed to correct it (Tr. 2005-2008). The trial judge then re-charged the jury on the subject, stating explicitly that the jury could not convict petitioner on an aiding and abetting theory but only as a principal (Tr. 2035-2038). At the conclusion of the recharge, the defense expressed satisfaction (Tr. 2038-2039). As at no time during the trial was evidence presented by the government to establish the aiding and abetting charges, the exclusion of the charges from the jury was correct.

2. Petitioner agues (Pet. 18-19) that the charges of falsely stating on certain returns that the taxpayer did

not intend to return to the United States should have been brought under 26 U.S.C. 7207, punishing such conduct as a misdemeanor, rather than under 18 U.S.C. 1001, punishing such conduct as a felony. It is well settled, however, that Section 1001 applies to false statements on tax returns. See, *e.g.*, *United States* v. *Beacon Brass Co.*, 344 U.S. 43; *United States* v. *Knox*, 396 U.S. 77. Where, as here, a defendant's conduct violates overlapping statutes, one of which charges a felony and the other a misdemeanor, the choice of which offense to prosecute is a matter within the discretion of the prosecutor. *United States* v. *Beacon Brass Co.*, *supra*, 344 U.S. at 45; see *Sansone* v. *United States*, 380 U.S. 343; *Berra v. United States*, 351 U.S. 131; *Newman* v. *United States*, 382 F.2d 479, 481 (C.A.D.C.); *United States* v. *Eisenmann*, 396 F.2d 565, 567-568 (C.A. 2).

3. Petitioner was ordered by the district judge to produce certain handwriting exemplars to the grand jury at a time when that body had already indicted him but was considering a superseding indictment which ultimately was returned. Petitioner furnished the exemplars. Thereafter at trial, the government on rebuttal called a handwriting expert for the purpose of proving that petitioner had examined Sixten Ehrling's file at Columbia Artists and therefore must have known of Ehrling's contracts and intent to return to the United States before the end of 1965. The government expert testified pursuant to stipulation that the words "copyright fees" appearing in two places in Ehrling's

financial statements contained in the file at Columbia Artists were written in the same hand as known samples of petitioner's handwriting in various tax returns (Tr. 1613-1624).

Petitioner relying on *In re Dionisio,* 442 F.2d 276 (C.A. 7), government petition for a writ of certiorari pending, No. 71-229, contends (Pet. 14-15) that the order compelling him to produce handwriting exemplars before the grand jury constituted a violation of his Fourth Amendment rights.[3] The handwriting exemplars produced before the grand jury, however, were not relied upon by the handwriting expert at trial, whose testimony was based solely on the known samples of petitioner's writing appearing in various tax returns. As the latter samples were readily available to the government irrespective of the exemplars produced before the grand jury, the expert's testimony was properly admitted even if—which we deny—petitioner's Fourth Amendment rights were infringed before the grand jury. In any event, the decision in *Dionisio* (which involved voice exemplars) was based on factors not involved here—the absence of a prior determination of probable cause and the alleged "dragnet" nature of the subpoenas, issued to more than twenty persons.

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[3] Petitioner also cites *Hill* v. *Philpott*, C.A. 7, decided May 17, 1971, 9 Cr.L. 2239. That case, however, dealt with whether certain tax records could be seized under the Fifth Amendment privilege against self-incrimination, and has no bearing on the issue here sought to be raised.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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